Paper No.
13
rls/em

8/24/00

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Cibao Meat Products, Inc.

Serial No. 75/428,204

Murray Schaffer for Cibao Meat Products, Inc.

Robert L. Lorenzo, Trademark Examining Attorney, Law Office 111 (Craig Taylor, Managing Attorney).

Before Simms, Cissel and McLeod, Administrative Trademark Judges.

Opinion by Simms, Administrative Trademark Judge:

Cibao Meat Products, Inc. (applicant), a New York corporation, has appealed from the final refusal of the Trademark Examining Attorney to register the mark shown below

for hot dogs, packaged for sale in supermarkets, groceries and butcher shops.[1] The Examining Attorney has refused registration under Section 2(d) of the Act, 15 USC §1052(d), on the basis of Registration No. 1,730,069, issued November 3, 1992, for the mark shown below, for restaurant, bar and lounge services.

Registrant has disclaimed the words "TAPAS BAR RESTAURANT" apart from the mark as shown.[2]

Applicant argues that the marks of registrant and applicant are visually different and project different

[1] Application Serial No. 75/428,204, filed February 3, 1998, based upon applicant's allegation of a bona fide intention to use the mark in commerce. The original description of goods was "hot dogs and sausages." Applicant has indicated that the mark is lined for the colors red, yellow and green, but that color is not a feature of the mark.

commercial impressions. With respect to the goods and services, it is applicant's position that the registration issued for a service mark for a Spanish tapas restaurant which, according to applicant, is the Spanish equivalent of a smorgasbord restaurant, where a variety of prepared foods are available in small portions.[3] In contrast, applicant's attorney states that applicant's goods--hot dogs sold in supermarkets--are different goods which travel in different channels of trade.[4]

We agree with the Examining Attorney, however, that the respective marks are very similar in commercial impression and that the goods and services are sufficiently related so that confusion is likely. As the Examining Attorney has noted, while the respective marks must be considered in their entireties, one feature may be recognized as more significant or dominant in creating a commercial impression. In re

---

[2] Sections 8 and 15 affidavit accepted and acknowledged, respectively.

[3] Applicant has submitted no evidence in support of this statement. "Tapas" are defined as "Spanish appetizers that can be hot or cold, simple or complex," in the material attached to the Examining Attorney's brief (from Webster's New World Dictionary of Culinary Arts (1997), of which we take judicial notice. We also take judicial notice of the definition from Webster's Third New International Dictionary (Unabridged) (1993), which defines "tapa" as ":SNACK".

[4] Applicant has also made much of a single misstatement in the final refusal (p.2) with respect to the Examining Attorney's misidentification of applicant's goods. We agree with the Examining Attorney that this misstatement, which is not elsewhere repeated by the Examining Attorney, appears to be an innocent mistake and does

National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). Accordingly, greater weight may be given to that dominant feature. Here the most prominent origin-indicating element in the registered mark is the name "EMILIO'S," and the most significant origin-indicating feature of applicant's mark is the identical name. We agree with the Examining Attorney that that name would be used in calling for the respective goods or services. While each mark contains a different design, we do not believe that those designs, considering the recollection of the average purchaser, who may retain but a general rather than a specific impression of trademarks, is sufficient to avoid likelihood of confusion.

With respect to the relatedness to registrant's services and applicant's goods, we believe that the evidence of record, including third-party registrations which issued both for restaurant services and for hot dogs (or sausages), and the Nexis excerpts which indicate that restaurant brand products are increasingly sold in supermarkets, supports the Examining Attorney's position of commercial relatedness. Also, we do not believe that the word "TAPAS" in the registered mark should serve, under the circumstances of this case, to limit the registrant's services to those of a "Spanish" restaurant. While this record establishes that the term "tapas" was

---

not make the final refusal "fatally flawed," as applicant's attorney

popularized by Spanish wine bars, this does not mean that registrant's restaurant, bar and lounge services are or should be construed as "Spanish" restaurant, bar and lounge services. Indeed, the record shows that these appetizers or snacks may be sold in different types of restaurants. The record also shows that tapas restaurants also serve sausages, goods which were in applicant's original description of goods, and which are similar, of course, to hot dogs.

Suffice it to say that we believe that consumers, aware of registrant's EMILIO'S TAPAS BAR RESTAURANT restaurant services, who then encounter applicant's EMILIO'S and design hot dogs in a supermarket or grocery store, would be likely to believe that these goods and services come from the same source or are sponsored by the same entity. See In re Best Western Family Steak House, Inc., 222 USPQ 827 (TTAB 1984) (restaurant services vs. frankfurters and bologna) and In re Mucky Duck Mustard Co., Inc., 6 USPQ2d 1467 (TTAB 1988) (mustard v. restaurant services). See also In re Azteca Restaurant Enterprises Inc., 50 USPQ2d 1209 (TTAB 1999). If we had any doubt, in accordance with precedent, that doubt should be resolved in favor of the prior user and registrant.

Decision: The refusal of registration is affirmed.

---

argues.

R. L. Simms

R. F. Cissel

L. K. McLeod
Administrative Trademark
Judges,

Trademark Trial and Appeal
Board